



**ASIC**

Australian Securities & Investments Commission

## CONSULTATION PAPER 2

# **Non-discretionary portfolio services**

May 1999

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**Your comments**

We invite your comments on the *proposals and issues for consideration* in this paper.

Comments are due by Friday 25 June 1999 and should be sent to:

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You can also contact Mark Adams, Principal Lawyer, Regulatory Policy on (02) 9911 2622 for further information about this policy proposal.

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# What this policy proposal is about

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This paper covers the approach we propose to take regarding application of the managed investment, dealers licence and fundraising provisions to the operation of a non-discretionary portfolio service.

The main features of this policy proposal paper are that:

[RPG - to be filled on completion of final PPP]

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# Our policy proposal — issues for consideration

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## Policy proposal

## Issues for consideration

### What is a non-discretionary portfolio service?

#### *Definition*

- 1 We consider a NDP service is a scheme that involves the acquisition or disposal of assets in which a client has an interest and providing consolidated reporting about the client's interest in assets acquired through or held under the service. Typically, these services offer custody of some assets and pass on financial benefits such as cost reductions. Most member discretionary master funds and wrap account services are NDP services.
- 2 A NDP service does not involve any discretion about acquisition or disposal of assets other than by the client.

#### *It is a managed investment scheme*

- 3 We consider a NDP service is likely to be a managed investment scheme.

1A Is this an adequate description of a NDP service (ie: one which includes member discretionary master funds and wrap account services)? If not, why? What other key characteristics (if any) should be included in a general description?

2A Are these assumptions correct? If not, what kinds of typical limitations exist to the nature of services offered under a NDP service?

3A Do you agree with this conclusion? If not, why not?

### Regulation of the operation of a NDP service

#### *Relief from the managed investment provisions where a dealers licence is held*

- 4 We will grant relief from the managed investment and fundraising provisions to the

4A Is it appropriate that we grant conditional relief from the

## Policy proposal

operator of a NDP service where the operator holds a securities dealers licence that contains conditions permitting the licensee to act as an operator of NDP services or the relevant NDP services if certain requirements are met.

- 5 We will grant relief from the managed investment provisions to the custodian of a NDP service where the custodian holds a securities dealers licence that contains conditions permitting the licensee to act as a custodian for NDP services or the relevant NDP services if certain requirements are met.

## Assessment of a dealers licence application

- 6 When assessing the dealers licence application of the operator or custodian of a NDP service or an application to vary a dealers licence to refer to a NDP service, we will assess the capacity and expertise of the entity to operate such a service efficiently, honestly and fairly.
- 7 This assessment will be made on a basis similar to that which we currently undertake when assessing the capacity and compliance arrangements to hold scheme property of an applicant for a licence to act as a responsible entity. The basis for this specific aspect of assessment is set out in:
- (a) Chapter D of *ASIC Policy Statement 130: Managed investments: Licensing except [PS 130.60(a)]*; and
  - (b) ASIC Policy Statement 131: Managed

## Issues for consideration

managed investment provisions? For instance, is it not arguable that the managed investment provisions are not inapplicable in the relevance or too burdensome?

- 5A Is it appropriate that we apply restrictions on the dealers licence of the operator and custodian of a NDP service? If not, why?
- 5B What other (if any) restrictions should we apply to the dealers licence of an operator or custodian of NDP service? If so, why should they be applied?
- 6A Is this general approach to considering the capacity and expertise of the operator or custodian or a NDP service inappropriate? If so, why?
- 7A Are there any other relevant analogies between the approach we take to licensing a responsible entity and an ordinary dealer? If so, what are they?
- 7B Are there reasons why these aspects of approach to licensing a responsible entity is not relevant to licensing (including a variation of

## Policy proposal

Investments: Financial requirements;  
and

- (c) *ASIC Policy Statement 133: Managed Investments: Scheme property arrangements except [PS 133.26(a)]* (including the custody-related financial resource requirements).

### Conditions of relief regarding ongoing operations

- 8 We propose to grant the relief from the managed investment provisions on the following conditions:
- (a) the operator and custodian must comply with the custodial standards for holding scheme property as applies to a responsible entity. The standards are described in *ASIC Policy Statement 133: Managed Investments: Scheme property arrangements*;
  - (b) the operator must satisfy the financial resource requirements for a responsible entity. Any custodian must meet the financial resource requirements applying to a person holding scheme property of a registered scheme. These requirements are set out in *ASIC Policy Statement 131: Managed Investments: Financial requirements*;
  - (c) the operator and custodian must maintain appropriate professional indemnity insurance. This should cover claims up to, and in aggregate, \$5 million, or the value of the assets held via the service, whichever is less;
  - (d) the operator and custodian must maintain adequate internal control procedures to ensure compliance with the Law and the conditions of this

## Issues for consideration

licence)an operator of  
custodian of a NDP service? If  
so, what are they?

- 8A Are these custodial standards appropriately applied? If not, why?
- 8B Are these financial resource requirements appropriate? If not, why?
- 8C What if any alternative financial resource requirements should apply? Why?
- 8D Are these professional insurance requirements appropriate? If not, why?
- 8E Are these internal control procedure requirements appropriate? If not, why?
- 8F Is it appropriate that the

## Policy proposal

proposed relief. The internal control procedures must be the subject of an annual audit by an auditor who would be eligible to be an auditor of the compliance plan if the NDS were a registered scheme as to whether:

- (i) the operator or custodian (as the case may be) has complied with the internal control procedures; and
- (ii) the internal control procedures continue to meet the requirements of this relief.

This additional auditor's report for the operator or custodian (as the case may be) must be lodged with us together with accounts and auditor's report under s860;

- (e) all money, securities and other scheme assets (not including assets held by the client) must be held on trust for the relevant client or clients of the NDP and comply with Part 7.6 in relation to those assets;
- (f) the operator and any custodian, must account for all money, securities and other assets held on behalf of the clients of the NDP service in accordance with Part 7.5;
- (h) the operator and custodian has in place at all times internal procedures to deal with complaints from clients of the NDP service. These procedures must be in accordance with *Australian Standard AS 4269:1995, Complaints Handling*;
- (i) the custodian must continuously offer to provide to the client, charged on the

## Issues for consideration

internal control procedures be audited? If not, why?

- 8G** Is this appropriate basis upon which the auditor should assess the internal control procedures of the operator or custodian of the NDP service? If not, why?

- 8H** Is it appropriate that the custodian hold assets on trust for the client? If not, why?

- 8I** Is it appropriate that assets be accounted for in accordance with Part 7.5? If not, why?

- 8J** Is it appropriate that the operator and custodian have adequate internal complaint procedures? If not, why?

- 8K** Should the operator and custodian be a member of an external complaints handling system? If not, why?

- 8L** Is it appropriate that we require that clients of the NDP service

## Policy proposal

basis of a reasonable administrative fee, a copy of all communications that are required by law to be sent to the holder or would be required by law if the holder elected as soon as practicable after the information is received by the custodian; and

- (k) the operator and any custodian must not exercise any discretion in their capacity as a holder of scheme assets (such as voting rights or rights to elect what information to receive) other than in accordance with the directions from time to time of the relevant client.
- (j) the operator and any custodian must be legally obliged to clients to perform their respective obligations honestly, in the best interests of clients, fairly as between clients and with reasonable care and diligence and must comply with those obligations.

## Issues for consideration

be offered the ability to have corporate communications (including from accessible a managed investment schemes)? If not, why?

**8M** Is the requirement in proposal paragraph 8(i) too inflexible? If so, why?

**8N** Is this limitation appropriate? If not, why?

**8O** Is it appropriate that we impose a standard of minimal performance for the operator and custodian of the NDP service? If not, why?

## Powers of direction of the client

**9** The client of a NDP service must have a right to be able to:

- (a) direct the custodian to take reasonable steps to transfer assets to or to the order of the client and to realise assets held for that client and pay the proceeds to or to the order of the client (less any fees and charges) unless the assets cannot lawfully be transferred or realised;
- (b) give the custodian directions as to how discretions the custodian has a holder of schemes assets are to be exercised in respect of assets held for that client. For example, this would include the exercise

**9A** Are these powers of the client unreasonable or inappropriate? If so, why?



**Policy proposal****Issues for consideration**

of voting rights and rights to reinvest distributions.

**Disclosure about the NDP service*****The brochure***

- 10 We propose that the operator must ensure that each prospective client of the NDP service, before the client agrees to use the service, receives a brochure which complies with disclosure obligations similar to that normally required for a concise prospectus under *ASIC Policy Statement 137: Concise prospectuses for managed investment schemes*.
- 11 In summary, the brochure must:
- (a) describe the main features of the service;
  - (b) set out the main terms and conditions of the service; and
  - (c) give answers to the following general questions:
    - (i) what is the nature of the service being offered in this brochure?
    - (ii) what are the risks and benefits of using the service?
    - (iii) what are the fees, charges, expenses and taxes associated with the service? (see proposal paragraph 18 for specific disclosure on this aspect);
    - (iv) who is the operator and any custodian?
    - (v) when and how can I terminate use of the service? and
    - (vi) what information can be obtained

10A Is it more appropriate that clients of NDP service receive a prospectus for the service? If not, why?

10A Is it more appropriate that clients of NDP service receive a concise prospectus for the service rather than a brochure modelled on the concise ? If not, why?

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from the operator or custodian?

### ***Brochure can comprise of documents***

- 12 The brochure may be made up of more than one document. For example, the brochure may be accompanied by a client agreement, fee schedule and a documents setting out what are the accessible securities.

### ***Updating the brochure***

- 13 The brochure for a NDP service must be supplemented or replaced if:
- (a) it contains a material statement that is false or misleading; or
  - (b) there is a material omission from its contents.

### ***Brochure must be lodged with us***

- 14 The brochure for a NDP service must be lodged with us. This obligation also applies to any supplements to the brochure or a replacement brochure.

### ***What are the accessible securities***

- 15 The brochure for a NDP service must:
- (a) contain a document which identifies the accessible assets; or
  - (a) contain a statement to the effect that a document which identifies the accessible securities in a detailed way is available on request free of charge together with a description of what kinds of assets may be accessed.
- 16 The document can describe accessible

## Issues for consideration

- 12A Should we set a limit as to how many documents can comprise a brochure? If not, why?

- 13A Should a brochure for a NDP service be subject to a obligation to update? If not, why?

- 13B Should a brochure for a NDP service be subject to an life of not more than 12 months? If not, why?

- 14A Should a brochure for a NDP service be lodged with us? If not, why?

- 15A Should we require a list about accessible securities to be in or accompany a brochure for a NDP service? If not, why?

- 16A Should we require each

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securities by a description of a class of accessible securities which may exist from time to time if all securities in the class are accessible.

- 17 When the material about what accessible securities are available is not contained in the brochure, the operator or custodian must keep copies of the list as may exist from time to time for at least 7 years.

## *Fees, charges and expenses*

- 18 The brochure for a NDP service must specify in relation to each class of accessible securities:

- (a) fees and charges payable to the operator and the operator's rights to recoup their expenses;
- (b) fees and charges (if any) payable by a client to the custodian and the custodian's right (if any) to recoup its expenses from a client. Nil fees or rights need to be disclosed;
- (c) fees and charges payable to the issuers of the accessible securities and their rights to recoup their expenses. These figures may be expressed as ranges; and
- (d) an estimate of the total of those fees, charges and expenses as a proportion of the assets under management via the service. This figure may be expressed as range.

## *Qualifying information about rights related to the accessible securities*

- 19 The brochure for a NDP service must contain a general description which:
- (a) explains what portions of disclosure

## Issues for consideration

accessible security to be identified specifically in the list? If not, why?

- 17A Should we require a current list of accessible securities not contained or accompanying a brochure of a NDP service to be lodged with ASIC? If not, why?

- 18A Are our proposed disclosure requirements about fees, charges and expenses in appropriate? If so, why?

- 18B In order that clients of a NDP service consider the costs associated with use of the service each time they give a direction, should clients of a NDP service a document setting out fees, charges and expenses accompany each form of direction related to the service? If not, why?

- 19A Should this qualifying information about the disclosure documentation accompany each disclosure

**Policy proposal**

documents for accessible securities are not relevant to a client who uses the service;

- (b) explains the differences between the rights of a holder of accessible securities and the rights of a client in the service in respect of accessible securities.

**Issues for consideration**

document for accessible securities? Will this assist clients read a disclosure document for an accessible security? If not, why?

**Limitations on acquiring accessible securities*****Disclosure (if any) as if investing directly***

**20** The custodian may only acquire accessible securities that are made available through the service if the operator is reasonably satisfied that:

- (a) they could be lawfully have been offered and issued or sold as the case may be to the client directly without the client being required to have received a prospectus or other disclosure document (eg purchase of ASX listed securities); or
- (b) the client has received a disclosure document for the securities which purports to comply with the Law (including as the Law may exist from time to time) as if the securities were being offered to and issued to the client directly (subject to any changes required to ensure the disclosure document is not misleading).

**20A** Is the issuer of the accessible securities making an offer for subscription of the accessible securities through the NDP service? If not, why?

**20B** What kinds of ways are likely to be used by an operator and custodian ensure that the custodian only acquires securities where the operator has formed a view that a client of the NDP service has *current* disclosure documentation about the NDP service and the accessible securities?

**20C** What kinds of ways are likely to be used by an operator to form a view that a client of the NDP service has *current* disclosure documentation about the NDP service and the accessible securities?

**20D** Should we allow access to securities through a NDP service where a client of the

## Policy proposal

## Issues for consideration

NDP service receives an information memorandum (based on a concise or full prospectus obligation) and securities recommendation about the accessible securities? If so, why?

**20E** Is there any difference in the way an information memorandum under our relief for member discretionary master funds and a prospectus (including a concise prospectus) is prepared?

**20F** What kind of information does an information memorandum under our relief for member discretionary master funds for accessible securities not include which a prospectus (including a concise prospectus) would include?

## ***Accessible managed investments must be registered***

**21** When the accessible securities to be acquired through the service are:

- (a) interests in a managed investment scheme - the scheme must be a registered managed investment scheme; or
- (b) prescribed interests - there must be an approved deed for those prescribed interests.

**Policy proposal****Issues for consideration****Basis upon which to act on a client's direction*****Receipt of current disclosure documentation***

22 Under its agreement with clients, before the custodian acquires securities at the direction of a client of the service, the operator must be reasonably satisfied that the client has received:

- (a) a copy of the *current* brochure for the service; and
- (b) except where the accessible securities could have been offered and issued or sold as the case may be to the client directly, - a copy of the *current* point of sale document for the accessible securities which complies with the Law (including as the Law may exist from time to time).

In both (a) and (b) the relevant disclosure documentation includes any updating supplementary documentation. The custodian must act in accordance with that agreement.

***Current disclosure must not be misleading***

23 The custodian must not acquire securities at the direction of a client of the service, unless as far as the operator and the custodian is aware the disclosure documentation referred to in proposal paragraph 22:

- (a) currently complies with the relevant requirements of the Law or ASIC concise prospectus relief or the relief proposed under the policy proposal paper (as the case may be) regarding the contents of the disclosure

22A What kinds of ways are likely to be used by an operator to form a view that a client of the NDP service has *current* disclosure documentation about the NDP service and the accessible securities?

23A What kinds of ways are likely to be used by an operator and custodian to form a view that a client of the NDP service has complying disclosure documentation about the NDP service and the accessible securities?

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documentation;

- (b) contained no material statement which was untrue or misleading;
- (c) was prepared and given in accordance with any other relevant requirements of the Law or the relief proposed under this policy proposal paper (as the case may be);.

### ***Authorisation of issuer of accessible securities***

- 24 The custodian must not act on any direction to acquire accessible securities on behalf of a client unless the operator is satisfied, on reasonable grounds, that the issuer of the disclosure documentation for the accessible securities referred to in proposal paragraph 22(b) has given prior written authorisation to its use for the purpose of making available those accessible securities through the service.

## Issues for consideration

- 24A Should the disclosure documentation for accessible securities include a statement that the issuer of the accessible securities has authorised the use of the disclosure document for the purpose of making available those accessible securities through the service? If not, why?

### **Other accessible financial products**

#### ***Consistent principles should apply***

- 25 The proposals set out in proposal paragraphs 20 to 24, regarding disclosure about the accessible securities and the basis to act on a client's direction, apply with any necessary allowances to other financial products that are not securities.

- 25A Is this general proposition appropriate? If what ways is inadequate to cope with eventual future possibilities?

- 25B Are there any significant problems with applying the proposal paragraphs 20 to 24 generally to other accessible financial products?

### **Reporting to the client**

#### ***Quarterly client report***

- 26 The operator or custodian must provide each

- 26A Is it inappropriate for clients to

## Policy proposal

client of the service with a quarterly report within two months after the end of 31 March, 30 June, 30 September and 31 December in each year (the quarter day) except for a quarter day which is the end of a financial year.

- 27 This quarterly report must contain information about:
- (a) all transactions to the client's account during the quarter;
  - (b) the assets and liabilities of the client to which the NDP service relates on the quarter day; and
  - (c) the revenue and expenses of the client to which the NDP service relates during the quarter.

### ***Annual client report***

- 28 The operator or custodian must provide each client an annual report within 3 months of the end of each financial year.
- 29 This annual report must contain information about:
- (a) all transactions to the client's account during the financial year;
  - (b) the assets and liabilities of the client to which the NDP service relates at the end of the financial year; and
  - (c) the revenue and expenses of the client to which the NDP service relates during the financial year.

### ***Annual audit report***

- 30 The operator or custodian must provide each client with an annual audit report within 3 months of the end of each financial year. This report must be prepared by the

## Issues for consideration

receive quarter reports? If so, why?

- 26B What alternative means can clients receive (or obtain) the content of regular client reports?

- 28A Is it inappropriate for clients to receive an annual report? If so, why?

- 30A Is it inappropriate for clients to receive an annual audit report as proposed? If so, why?



## Policy proposal

registered company auditor that has audited the accounts of the custodian.

- 31 This annual audit report must state to the effect that the auditor has:
- (a) examined the design and operation of the accounting procedures and other internal controls of the custodian to provide reasonable assurance that the client's reports generally were not materially misstated; and
  - (b) reconciled the aggregate of assets, liabilities, revenue and expenses shown in the client's accounts to the corresponding amounts shown in the audited statements of the custodian and has no cause to believe that the client's accounts are materially misstated.

## Issues for consideration

### Electronic delivery and receipt of information

#### *General proposition*

- 32 It is consistent with the proposals contained in this policy proposal paper that documents can be delivered and received by electronic means. This includes the delivery and receipt of brochures about the service, disclosure documentation about accessible securities and other communications to and from clients.

#### *Our "electronic prospectus" policy*

- 33 We consider the delivery of brochures about the service and disclosure documentation about accessible securities must be provided electronically in a way that is consistent with our policy in *ASIC Policy Statement 107: Electronic prospectuses*.

- 32A Are there circumstances when this general proposition is not appropriate? If so, why? Please give some examples?

- 33A Are there reasons why our policy on electronic prospectus should not generally apply to brochures about the NDP service? If so, what are they?

**Policy proposal****Issues for consideration*****Delivery and access to client reports***

34 Reports to clients may be provided to clients electronically when:

- (a) the clients agrees to receive the information electronically; and
- (b) the operator or custodian are reasonably satisfied that the client has accessed the relevant report.

34A In what ways will an operator or custodian satisfy themselves that a client of a NDP service has acknowledged receipt of a client report?

34B Are our limitations on relying on electronic delivery of client reports inappropriate? If so, why? What alternative ways exist to ensure that a client has received the client report?

**Relief for issuer of Accessible Securities**

35 If an issuer of accessible securities allows its securities to be issued to the custodian of a NDP service, the issuer may be making an offer of the securities or units of those securities for subscription to the clients of the NDP service.

36 We propose to give relief to issuers of accessible securities from the fundraising provisions in relation to such offers for access via a particular NDP service on the following conditions:

- (a) the issuer must have a prospectus that is lodged and registered if registrable in relation to the securities that complies with the Law;
- (b) the issue must have given an authorisation as referred to in proposal paragraph 24 that applies in relation to the NDP Service;
- (c) the issuer must notify the operator of the NDP service if there is any supplementary or replacement

**Policy proposal****Issues for consideration**

prospectus;

- (d) the operator and the custodian must have stated in writing to the issuer that they will comply with the conditions of our proposed relief as set out in proposal paragraphs 4 and 5 or 41 (as the case may be) and the issuer must not be aware of any non compliance with the conditions.

**Transitional measures*****Pending finalisation of our policy on NDP services***

- 37 Pending finalisation of our policy towards the operation of NDP services, we will continue to take the following policy position:
- (a) for member discretionary master funds - relief continues to apply to such schemes as currently set out in ASIC Class Order [CO 96/1580] and discussed in *ASIC Policy Statement 94: Member discretionary master funds - disclosure policy* and *ASIC Policy Statement 55: Covenants in deeds* discussed at [PS 55.87A] to [PS 55.87F]; and
  - (b) for "wrap accounts" - we will consider granting relief to applicants on a case by case basis in a form similar to that attached as an annexure to *ASIC Information Release [IR 99/10]*. This relief will not be granted on a pro forma basis.
- 38 When considering whether to grant the relief for wrap accounts, we will consider whether the licensed dealer operating the "wrap account" can demonstrate appropriate capacity and compliance arrangements in order to operate such a "service". This

- 37A Should we have a more flexible interim policy position? If so, why? Please give examples of significant problems with our interim policy position.

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assessment will be made on a basis similar to that which we currently undertake when assessing the capacity and compliance arrangements to hold scheme property of an applicant for a license to act as a responsible entity. The basis for this specific aspect of assessment is set out *Policy Statement 133: Managed Investments: Scheme Property* (ignoring the custody-related financial resource requirements for a responsible entity).

### ***Upon finalisation of our policy on NDP services***

- 39 We propose that the relief provided under ASIC Policy Statements 94 and 55 relating to the operation of member discretionary master funds be revoked 13 months from the finalisation of our policy on NDP services.

## Issues for consideration

- 39A Should we allow a longer “transition period” upon finalisation of our policy on NDP services? If so, why?
- 39B Are there significant problems for current operators of member discretionary master funds and wrap accounts to operate their scheme under the proposed requirements under this policy proposal paper? If so, what are some examples?
- 38C Should we continue to apply our policy on member discretionary master funds as an alternative to our policy proposed in this paper? If so, why? Please give examples.

**Policy proposal****Issues for consideration****Nominee or transaction services*****What is a nominee or transaction service***

**40** We consider a nominee or transaction service to be a form of NDP service which normally does not provide:

- (a) any cost reductions relative to investing directly alone in the accessible securities; and
- (b) access to securities which a client could not otherwise access if investing directly alone.

***Relief for nominee services***

**41** To provide commercial certainty, we will grant operators and custodians of a nominee service relief from the managed investment provisions and fundraising provisions on conditions similar to that contained in proposal paragraphs 20 to 24 (except 22(a)) regarding disclosure about the accessible securities and the basis for acting on the client's directions.

**40A** Is this an adequate description of a nominee service? If not, what key characteristics are missing?

**41A** Should nominee services be subject to relief on the same basis as any other NDP service? If so, why?

**41B** Is our proposed relief for nominee services appropriate? If not, why?

**41C** Do operators of nominee services already ensure that clients receive all appropriate point of sale disclosure documentation about accessible securities? If so, on what basis have they done so, eg: best practice?

**Managed discretionary accounts by SFE members*****Interim policy***

**42** As indicated in *ASIC Policy Statement 136: Managed investments: Discretionary*

**42A** Is there any significant reasons why this policy review should

**Policy proposal**

*powers and closely related schemes*, we will continue to apply interim relief for the operation of managed discretionary accounts operated by members of the Sydney Futures Exchange Ltd (SFE). We will extend this interim policy position until 30 June 2000.

**Policy review**

- 43 We will reassess the continued operation of the interim policy position described in proposal paragraph 42 as part of a review of the operation of managed discretionary accounts by licensees generally. This review will also consider implications for the operation of NDP services provided (if any) by these licensees.

**Issues for consideration**

take a higher priority? Is so, why?

**Managed discretionary accounts by ASX members**

- 44 Pending any results of a wider review of managed discretionary accounts, we will continue to apply a no enforcement position in relation to the managed investment and fundraising provisions in relation to the operation of discretionary portfolio services offered by ASX members as we have done in relation to the prescribed interest provisions. We take this interim position on the basis that ASX members are subject to additional regulation by ASX.

# Explanations

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## What is a non-discretionary portfolio service?

### Definition

1 We consider a “non-discretionary portfolio service” involves the operation of a transactional and consolidated reporting service.

2 Typically, a NDP service provides anyone or more of the following benefits to a client who uses the service:

- (a) cost savings to clients through pooling or netting of transactions;
- (b) access by clients to investment opportunities through pooling that they could not access otherwise than by the service. For example, this may include access to registered managed investment schemes which have high minimum subscription requirements;
- (c) the ability to select from a menu of accessible securities that are made available through the service that the operator has selected as suitable investments;
- (d) a reporting service. For example, this may include a degree of filtering of information regarding accessible securities held by or on behalf of a client; and
- (e) the exercise of incidental discretions by the operator or custodian.

3 Common varieties of a NDP service include:

- (a) a “member discretionary master fund” which is a unit trust where the trustee acquires and disposes of accessible securities at the direction of a client and the entitlement of each client depend on the securities that the trustee holds because of their directions although the client has no beneficial interest in any specific trust property. The participants do not have control over the way in which the trustee holds assets in custody; and
- (b) a “wrap account” which is like a member discretionary master fund except that assets acquired for a participant are held on trust for the participant (eg: nominee for the purposes of holding

managed investment scheme interests on behalf of the client) or in some cases are acquired as agent for the participant and held in the participant's name (eg: listed shares via the CHESS system).

4 We consider that member discretionary master funds and wrap accounts provide a similar economic interest in accessible securities to clients of the respective NDP service.

5 Generally, a NDP service involves two key operative aspects, namely:

- (a) the operator - which for the purposes of this policy proposal paper means the entity who offers participation in the NDP service which may be part of a wider investment service. For example, when a financial planning firm which badges the NDP service as its own; and
- (b) the custodian - which for the purposes of this policy proposal paper means the entity which provides the back office systems and administrative support to undertake the master custody and client account reporting services. For example, this may be an unrelated entity engaged by the operator or a related entity of the same financial group established as a custodian.

6 The operator may also be the custodian. We expect that in some cases the custodian will be the operator.

### **It is a managed investment scheme**

7 For the purposes of this policy proposal paper, a "scheme" will be a managed investment scheme if it satisfies paragraph (a) of the definition of "managed investment scheme" in s9 of the Law. The relevant definition is as follows:

"(a) a scheme that has the following features:

- (i) people contribute money or money's worth as consideration to acquire rights (*interests*) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not)
- (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the *members*) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders)



- (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions)".

8 We consider a NDP service is likely to be a managed investment scheme where clients get access to investments that would be otherwise be unavailable, or can transact at less cost than if they transacted themselves. In particular this applies to member discretionary master funds and certain wrap account services.

9 We consider a NDP service is likely to be a managed investment scheme whether or not the service is established as a unit trust or incidentally involves pooling. In such situations we consider there still likely to be a managed investment scheme based upon the concept of a common enterprise.

## **Regulation of the operation of a NDP service**

### **Relief from the managed investment provision where a dealers licence is held**

#### ***Operation of a registered managed investment scheme***

10 In general, you must meet the following three requirements of the Law if you want to operate a managed investment scheme:

- (a) the operator must be a public company and be licensed with an authorisation to operate the managed investment scheme;
- (b) the scheme must be registered; and
- (c) a prospectus must be issued.

11 You must meet these requirements unless your scheme is a one-off promotion with no more than 20 members, all the interests are issued by excluded issue or you have been given relief by us from the need to register your scheme.

12 The operator of the scheme must be a public company and licensed to operate the managed investment scheme as a responsible entity (certain minimum capital requirements apply).

13 The scheme must be registered, which means that there must be:

- (a) a constitution and compliance plan which meet the requirements of the Corporations Law;

- (b) an auditor appointed to review compliance with, and the adequacy, of the scheme's compliance plan;
- (c) either at least half of the operator's board must be comprised of external members or the operator must appoint a compliance committee, the majority of which is comprised of external members. (The board or compliance committee must monitor compliance with the scheme's compliance plan.); and
- (d) at least annual audited financial statements for the scheme lodged with us and provided to members of the scheme.

14 Generally offers of interests in the scheme must be made in a registered prospectus to facilitate an investor making an informed decision whether to invest in the scheme or not.

15 We have issued some general policy statements about complying with the managed investment provisions.

*See our Policy Statements 130 to 134 on Managed Investments.*

*A list of these policy statements is included in the Related Information section of this policy statement at X.*

### ***Relief from the managed investment provisions***

16 We consider that it is inappropriate for all aspects of the managed investment provisions, as summarised in paragraphs 10 to 15, to apply in relation to the operation of a NDP service. We hold this view for the following reasons:

- (a) the uncertainty surrounding whether NDP services (of all types) are managed investment schemes;
- (b) NDP services do not involve investment management discretion rather they facilitate an investor's transactions in relation to a portfolio; and
- (c) the features of a NDP service which tend to suggest it is likely to be a managed investment scheme are in general incidental to the service being offered.

17 We consider a more appropriate basis for regulating the operator and custodian of a NDP service is the dealers licence provisions related to the operation of a securities business and conditions of exemption. We hold this view as the dealers licence provisions mean that:

- (a) the operator and custodian will need to demonstrate that they have the capacity and expertise to operate a NDP service efficiently, honestly and fairly; and
- (b) the operator and custodian will be subject to ongoing operational obligations in relation to their dealing activities. These obligations include:
  - (i) complying with certain conduct of business rules. For example: regarding putting in to effect transactions at the client's request (See Part 7.4);
  - (ii) obligations relating to the financial statements and audit of dealers' accounts (see Part 7.5);
  - (iii) the holding of client assets in a dealer's trust account (see Part 7.6); and
  - (iv) putting in place internal control procedures (s860 and Form 712 item 4(b)).

19 We consider that these initial and ongoing requirements cover some of the core relevant aspects of the managed investment provisions which are relevant to the operation of a NDP service while avoiding any unreasonably burdensome requirements.

## **Assessment of a dealers licence application**

20 When considering a dealers licence application by an intended operator or custodian of a NDP service we will require the applicant to demonstrate that they have the capacity and expertise to operate a NDP service efficiently, honestly and fairly.

21 We consider that when assessing an application for a dealers licence to undertake a securities business we can take into account the intended activities of the applicant. This includes taking into account activities which may be considered incidental to the activity of dealing in securities intended by the applicant.

22 Given the nature of a NDP service, we consider there are useful analogies between the way we assess a dealers licence application to operate a managed investment scheme and a dealers licence to operate a securities business including a NDP service. In particular, we consider there are direct analogies in the way we assess a dealers licence application to operate a managed investment scheme relating to its capacity and compliance arrangements to hold scheme property.

23 On this basis, when assessing an application by the intended operator or custodian of a NDP service we will apply those relevant aspects of assessment as set out in:

- (a) Chapter D of *ASIC Policy Statement 130: Managed investments: Licensing except for requirements in relation to the compliance committee*;
- (b) *ASIC Policy Statement 131: Managed Investments: Financial requirements*; and
- (c) *ASIC Policy Statement 133: Managed Investments: Scheme property arrangements* (including the custody-related financial resource requirements) *except for requirements in relation to the compliance committee*.

24 We expect that when there is an unrelated operator and custodian that the operator will be primarily be able to satisfy the licensing requirements related to the holding of scheme property by demonstrating a considered engagement of the custodian and ongoing monitoring of the custodian's activities in relation to the NDP service.

## **Conditions or relief regarding ongoing operations**

26 We consider it is appropriate that those aspects of the managed investment provisions relevant to the operation of a NDP service should apply as conditions of our proposed relief.

27 The relevant conditions are set out in proposal paragraph 8. We consider that these conditions are reasonable and appropriate given the nature of the operation of a NDP service. We also consider that these conditions are not too burdensome in their application. We hold this view as in some cases:

- (a) they merely reflect ordinary ongoing licensing obligations;
- (b) they apply relevant minimum standards of the managed investment provisions.

## **Powers of direction of the client**

29 We consider that these conditions of our proposed relief merely reflect and reinforce the standard rights of a client of a NDP service.

## Disclosure about the NDP service

### The brochure

30 We consider that prospective clients of a NDP service, before agreeing to use the service, should receive simple but meaningful information about the service. The proposed disclosure obligations for the brochure about the NDP service are similar to that normally required in a concise prospectus under *ASIC Policy Statement 137: Concise prospectuses for managed investment schemes*. For a summary of the proposed disclosure requirements for the brochure about the NDP service see the Annexure to this policy proposal paper at paragraphs X to Y. **[Please not RPG this to be drafted]**

31 Given the nature of a NDP service (see paragraphs 1 to 6), we are of the view it is not necessary that prospective clients of a NDP service receive a prospectus about the service. However, we note that the brochure about the NDP service must not contravene the general misleading and deceptive prohibitions in the Law and ASIC Act.

32 Our interim relief for wrap accounts (see *ASIC Information Release [IR 99/10]*) requires that prospective clients of the NDP service receive simple but meaningful information about the service. These requirements were settled prior to the finalisation of our policy on concise prospectuses. It is now appropriate that the disclosure requirements for the NDP service be based on our more considered approach to simple but meaningful disclosure aimed at the information needs of ordinary investors.

33 We consider the responsibility for the content of the brochure lies with its issuer.

### Brochure can comprise of documents

34 We consider that the operator and custodian of a NDP service should have flexibility on the nature of the disclosure documentation about the service. It is appropriate that the brochure can be made up of more than one document. For example, the brochure could comprise of a core disclosure document, a client agreement, a fee schedule, a document about what accessible securities are available and any other documents the operator and custodian may determine.

## **Updating the brochure**

35 It is appropriate that the brochure disclosure requirements should be subject to a obligation to update the brochure about the NDP service if:

- (a) it contains a material statement that is false or misleading; or
- (b) there is a material omission from its contents.

36 This requirement is consistent with the general obligations to update a prospectus or an Advisory Services Guide.

## **Brochure must be lodged with us**

37 Notwithstanding the brochure about the NDP service is not a prospectus, we consider it is appropriate that a copy of it be lodged with us (including any supplements to the brochure or a replacement brochure).

38 This requirement is consistent with the prospectus requirements.

## **What are the accessible securities**

39 It is appropriate that clients of a NDP service can require a copy, free of charge, of a document which identifies the accessible securities through in a detailed way.

40 We do not consider that this information must be set out in or accompany the brochure as it could be quite long and may need to be updated regularly. (However, the issuer of the brochure may wish to do so).

41 We also consider that it is appropriate that the operator be permitted to describe readily identifiable classes of accessible securities provided the disclosure is meaningful. For example, rather than name all the accessible securities quoted on ASX, a general statement regarding access to securities quoted on ASX from time to time (other than those where trading has been suspended not temporarily) would be sufficient.

42 On the basis the list does not need to be lodged with us we consider it appropriate to require that copies of the list be kept by the operator or custodian for at least 7 years (unless, of course, the list is contained in the brochure lodged with us). This is consistent with the general record keeping requirement of the Law.

## **Fees, charges and expenses**

43 Although the brochure about the NDP service does not need to disclose information on the accessible securities, we consider that it must still include information on the fees, charges and expenses associated with the use of the service.

44 It is appropriate that the brochure about the NDP service contain details of the fees, charges and expenses of:

- (a) the NDP service itself (including costs associated with use of the custodian); and
- (b) investing through the service (including costs associated with the accessible securities).

This will assist clients of a NDP service to readily assess and compare the costs associated with investing through the NDP service or investing directly.

45 We do not propose imposing detailed requirements as to how fees, charges and expenses must be disclosed. However, we expect that such disclosure should be in a manner readily understandable to investors and which allows relevant comparisons to be made.

46 We accept that costs for accessible securities should be able to be set out in ranges.

## **Qualifying information about rights related to accessible securities**

47 We consider it is appropriate that clients of a NDP service are informed clearly about the differences between the rights of an investor who accesses securities through the NDP service and the rights of a direct investor in those securities. This would include, for example, any different basis for calculating income distributions or the lack of any entitlement to receive periodic reports and notices of meetings from issuers of accessible securities.

48 Given this qualifying information about the accessible securities can be described in a general but meaningful way we do not propose requiring this information be contained in or accompany the specific disclosure document (if any) for the accessible securities.

## **Limitations on acquiring accessible securities**

### **Disclosure (if any) as if investing directly**

49 We consider that it is core aspect of our proposed relief that clients of a NDP service should receive information that they reasonably require to make investment decisions. Consistent with that principle, it is appropriate that clients of a NDP service receive the same disclosure documentation (if any) as if a direct investor.

50 Therefore, we will not permit the acquisition of securities by the custodian for the purposes of the NDP service unless:

- (a) the accessible securities may be invested directly by the client without having to receive a disclosure document required by the Law. For example, this will permit buying securities quoted on ASX and trading has not been suspended other than temporarily; and
- (b) there is a point of sale disclosure document for the accessible securities which complies with the Law (including as the Law may apply from time to time). For example, this will permit investment in securities for which there is a prospectus (including a concise prospectus for managed investment schemes) and a secondary trading notice.

51 Our proposal will facilitate clients giving directions in relation to initial public offerings of company securities. However, as discussed this will be subject to the issuer of the relevant prospectus authorised its use for the purposes of access through the NDP service.

### ***No access to "wholesale" securities based on an information memorandum and securities recommendation***

52 Consistent with our relief for member discretionary master funds, we are aware that most operators of a member discretionary master fund provide their clients with access to "wholesale" securities (such as managed investments with a high minimum subscription price) on the basis of an information memorandum and securities recommendation. For many operators of these schemes this involved a great deal of work with issuers of wholesale managed investment schemes to prepare information memoranda badged for the relevant operator of the scheme. This use of



resources resulted in a preferred degree of standardised comparable documentation.

53 Further, we know that one of the commercial drivers for the relief for member discretionary master funds was to enable access to "wholesale" managed investment schemes. However, the distinction between retail and wholesale managed investment schemes is increasingly becoming blurred.

54 We are aware that industry want us to:

- (a) provide as much certainty as possible about who is responsible for the disclosure about the accessible securities;
- (b) provide a framework that clients of a NDP service receive simple disclosure documentation about the accessible securities. The more simple the disclosure the easier it will enable comparison between accessible securities. This will reduce the commercial need to "badge" disclosure documentation about the accessible securities to relate to the particular NDP service.

55 We are also informed that the due diligence process for finalising the content of a prospectus and an information memorandum are the basically the same. However, there may be an additional cost for the publication finish of a prospectus as opposed to an information memorandum.

56 Against this background and on balance of competing commercial wishes, we propose that clients of an NDP service should not be permitted access to securities for which there is not a point of disclosure document which complies with the Law (as it may exist from time to time). Our proposal means clients of NDP services receive disclosure about accessible securities as if they were a direct investor. Further, it means that it will be clearer that the issuer of the accessible securities takes responsibility for the content of disclosure documentation for the accessible securities. This will also mean that clients will not be able to access securities based on receiving an information memorandum and securities recommendation.

57 It is our view, that it will not be too burdensome for issuers of "wholesale" managed investment schemes to prepare and issue prospectuses. They can prepare and issue a concise prospectus as their primary point of sale document.

58 The flexibility of our proposed relief will enable access to securities based on whatever the Law permits as a point of sale document. Currently, the Federal Government has a number of

relevant proposals for short, simple point of sale disclosure documentation, namely:

- (a) the profile statement as proposed under the *Corporate Economic Law Reform Program Bill 1998*; and
- (b) the financial product information statement as proposed under the consultative document issued in February 1999 entitled *Financial products, service providers and markets - An integrated framework*.

59 We propose to facilitate use of any point of sale documentation permitted under any future legislative amendments.

### **Accessible managed investments must be registered**

60 It is appropriate that clients of a NDP service are afforded the same protections related to the operation of managed investment schemes as if a direct investor. On this basis, we will not permit the acquisition of securities by the custodian for the purposes of the NDP service unless:

- (a) interests in a managed investment scheme - the scheme must be a registered managed investment scheme; or
- (b) prescribed interests - there must be an approved deed for those prescribed interests.

61 This restriction is consistent with the investment restrictions applying to registered managed investment schemes.

## **Basis upon which to act on a client's direction**

### **Receipt of current disclosure documentation**

62 We consider that a custodian must not act on a client's directions unless the operator is reasonably satisfied that the client of the NDP service has received all relevant *current* disclosure information. The concept of *current* disclosure documentation includes whether the document has been updated by a supplementary document or a replacement document. Our proposal is consistent with our concern that clients of a NDP service receive similar disclosure documentation as if a direct investor.

63 Our proposal provides flexibility for the operator as to how it satisfies itself that the client has received the relevant documentation (if any). For instance, technology may facilitate new ways to provide sufficient comfort.

64 Further, our proposal does not require that a fresh brochure for the NDP service or a fresh disclosure document for the accessible securities is provided to the client before acting on each direction. For instance, the custodian could act on the basis that it the operator is reasonably satisfied the client of the NDP service has already received the relevant disclosure documentation. Consistent with our relief for top-ups and switches, the custodian may wish to ensure that procedures are put in place that fresh disclosure documents are regularly (eg: annually) provided to clients of the NDP service. See *ASIC Policy Statement 127: Additional investments in managed investment schemes*.

65 We do not propose to require that the custodian may only act on a direction from a client of a NDP service if the client has received a fresh brochure and disclosure documentation about the accessible securities.

66 If the operator is not reasonably satisfied that the client of the NDP service has made a direction based on current disclosure documentation in its possession the custodian should follow a procedure similar to that described in s1024E (ie: reject the direction or ask the client to confirm the direction based on all the relevant information now being provided to the client). For example, this situation may arise when the operator knows an issuer of accessible securities has issued a supplementary prospectus and is not reasonably satisfied that the client has a copy of the supplementary prospectus (although the client does have the relevant prospectus which has been supplemented).

### **Current disclosure must not be misleading**

67 We also consider it is appropriate that the custodian must not act on a direction if the operator or the custodian is aware that the brochure or disclosure documentation about the accessible securities is deficient whether because they are not *current* or otherwise. This proposal supports our proposal that the custodian must not act on a direction unless the operator is reasonably satisfied that the client of the NDP service has received the *current* disclosure documentation.

68 If the custodian or operator is aware that the client of the NDP service has made a direction based on deficient disclosure documentation in its possession the custodian should follow a

procedure similar to that described in s1024E (ie: reject the direction or ask the client to confirm the direction based on all the relevant information now being provided to the client). For example, this situation may arise when the custodian knows an issuer of accessible securities has informed the operator the current prospectus is deficient and intends to issue a supplementary prospectus promptly and the operator has passed on this information to the custodian.

## **Authorisation of issuer of accessible securities**

69 We consider it is appropriate that the issuer of accessible securities has authorised the use of its disclosure documentation for the purposes of making its securities accessible via the NDP service. We hold this view as it:

- (a) ensure the issuer of the accessible securities knows which NDP services are offering access to their securities; and
- (b) will provide an evidentiary link as to who relies on the content of the relevant disclosure documentation.

## **Other accessible financial products**

70 We aware that it is likely that NDP services will be increasingly expanded to include access to financial products which are not securities. For example, they may provide access to banking and insurance products.

71 We consider that the proposals in proposal paragraphs 20 to 24 addressing:

- (a) limitations on acquiring accessible securities; and
- (b) the basis upon which a custodian can act on the instructions of a client of a NDP service,

are equally applicable to contemplate the inclusion of a wider set of accessible financial products.

72 Of course, applying the basis for our relief in the context of other accessible financial products will need to be considered taking into account any the form of disclosure requirements that apply to those products.

## Reporting to the client

73 We consider it is appropriate that clients of a NDP service receive regular client transaction reports. This provides an appropriate form of accountability.

74 It is appropriate that these reports be at least quarterly. This proposal sets a frequency of reporting which is similar to or less onerous than current practice and requirements for client bank account statements, and securities contract notes and our own policy on under *ASIC Policy Statement 127: Additional investments in managed investments*.

75 We also consider it is appropriate that client's of a NDP service receive an annual audit report on the annual statements of client's accounts although not on an individual basis. This requirement may be satisfied by the audit report requirement on the internal control procedures of the operator and custodian of a NDP service in proposal paragraph 8(d).

76 There is nothing to stop a client nominating as their address from time to time as care of the office of their financial adviser other than the operator or the custodian or their associates. However the operator must be reasonably satisfied that client does receive any information required to be provided to the client.

## Electronic delivery and access to information

### General proposition

77 Generally we hold the view that our policy should be flexible enough to facilitate the delivery and receipt of information via electronic means. We consider that the relief proposed in this policy proposal paper is capable of being complied with in the electronic medium (eg: on-line over the internet).

78 As a general proposition we consider all delivery and receipt requirements of our relief under this policy proposal paper may be satisfied in the electronic medium. For example, the operator may offer a facility to deal with complaints on-line.

### Our "electronic prospectus" policy

79 We consider it is reasonable and not too burdensome for the delivery of brochures about the NDP service or disclosure

documentation about accessible securities to be provided in a manner consistent with our policy in *ASIC Policy Statement 107: Electronic prospectuses*.

80 As a general policy, PS 107 already applies to the delivery of prospectuses in the electronic medium, this would include prospectuses about the accessible securities. We consider that it is appropriate that operators and custodians of a NDP service should also comply with the relevant aspects of our policy in PS 107 when providing a brochure about the NDP service. Whilst not being a prospectus the brochure about a NDP service is an important disclosure document for which PS 107 is relevant.

81 Key aspects of PS 107 are in summary:

- (a) a paper copy of the electronic document should be available on request free of charge;
- (b) the issuer of the document should take reasonable steps to ensure that the complete electronic document is received by the client (including any relevant accompanying documents such as an application form or updating information);
- (c) the electronic document should contain the same information in the same sequence as in the paper document; and
- (d) the issuer should encourage clients to make decisions on the basis of the electronic brochure or electronic prospectus (as the case maybe).

## **Delivery and receipt of "reports" to clients**

82 We understand that industry participants are concerned that any client report requirements proposed by us should be able to be satisfied in the electronic medium.

83 We consider that client reports under proposal paragraphs 26 to 31 can be provided electronically provided:

- (a) the clients agrees to receive the information electronically; and
- (b) the operator and custodian are reasonably satisfied, that the client has received the relevant report.

84 Whilst we accept information sent electronically is similar to the delivery of information by the post, we consider that there is more likelihood of people dealing with any post they receive than electronic email. For example, a person may only infrequently read their electronic email. On this basis, we will consider that the

requirement to send client reports can be satisfied in the electronic medium where the custodian is reasonably satisfied the client has accessed the information. For example, confirmation of receipt of email.

## **Relief for the issuer of accessible securities**

85 If an issuer of accessible securities allows its securities to be issued to the custodian of a NDP service, the issuer may be making an offer of the securities or units of those securities for subscription to the clients of the NDP service. This is because the issuer may be causing or authorising the offer.

86 Accordingly, where there is no complying prospectus in relation to that offer, the issuer of accessible securities may be in contravention. We propose to give conditional relief so that if the issuers of accessible securities has lodged a complying prospectus or other disclosure document to a NDP service that is relying on the relief the issuer of accessible securities will not be in contravention. The issuer of accessible securities must inform the operator when the disclosure document in relation to the accessible securities is not current so that no further directions can be accepted based on an out of date disclosure.

## **Transitional measures**

### **Pending finalisation of our policy on NDP services**

87 Pending finalisation of our policy on NDP services, we will continue to apply the interim policy position set out in *ASIC Information Release [IR 99/10]* issued on 15 February 1999. We consider this position is reasonable and fair in the context where we understand that many entities are considering the operation of the current or proposed NDP services.

87 We confirm that pending finalisation of the policy on NDP services, we will only consider minor or technical modifications to the our current relief regarding the operation of member discretionary master funds and that we are prepared to grant for the operation of "wrap accounts".

## **Upon finalisation of our policy on NDP services**

88 We intend to revoke our current relief for the operation of member discretionary master funds 13 months after the finalisation of our policy on NDP services. We consider this will provide operators of such schemes enough time to take into account the implications of our amended policy position regarding NDP services.

89 We are not aware of any reasons (such as taxation implications) that will hinder the transition of member discretionary master funds current operating under our relief for such schemes to NDP services operating under our the relief proposed in this policy proposal paper.

90 We consider that operators relying on our current relief for the operation of member discretionary master funds are likely to continue operation under the relief proposed under this policy proposal paper as generally it is less burdensome.

91 Relief for wraps account services that is sunsetted will continue in force until it expires. We propose that other relief for wrap services will be revoked 13 months after the issue of a final policy subject to affording procedural fairness to the affected persons.

## **Nominee or transaction services**

### **What is a nominee or transaction service?**

92 We consider a nominee or transaction service is a sub-category of a NDP service. The main distinguishing feature of a nominee service is that they do not normally provide:

- (a) any cost reductions which a client would not otherwise receive if investing directly alone in the accessible securities; and
- (b) access to securities which a client could not otherwise access if investing directly alone.

### **Relief for nominee or transaction services**

93 We consider that it is reasonable to provide an operator and custodian (normally the one party in this case) of a nominee service relief from the managed investment provisions to provide commercial certainty on condition that clients receive any relevant



disclosure documentation as if they were a direct investor (see proposal paragraphs 20 to 24 (except paragraph 22(a)). This means that we do not propose to apply conditions relating to ongoing operation of the service or disclosure in relation to the service as contemplated in this policy proposal paper.

94 Our proposed relief for the operation of nominee services is considered appropriate for the following reasons:

- (a) the uncertainty surrounding whether nominee services (as a form of NDP service) are managed investment schemes;
- (b) nominee and transaction services can operate as very simple structures; and
- (c) the need to ensure that use of nominee and transaction services does not avoid investors getting disclosure about accessible securities.

95 We anticipate that our proposed relief for operators of nominee services will not affect the current operation of most nominee services as most do not provide access to securities for which the Law does require disclosure documentation to be issued (eg: shares quoted on ASX).

## **Managed discretionary accounts by SFE members**

### **Interim policy**

96 We will extend our interim policy of relief for the operation of managed discretionary accounts by SFE members under [CO 98/63] until 30 June 2000. We will grant this extension as we are not aware of any significant reason why:

- (a) our interim policy should be reassessed until our intended policy review takes place (see PS 136 at [PS 136.51]);
- (b) our intended policy review need to occur earlier as a matter of priority.

97 We note this subject in this policy proposal paper as we acknowledge there are some similar policy issues relevant to the operation of NDP services and managed discretionary accounts.

## Policy review

98 As stated in PS 136 at [PS 136.51] we intend to undertake a policy review of our interim relief for the operation of managed discretionary accounts by SFE members. This proposed review is to reassess our policy in the context of the recently introduced managed investment provisions. We intend that this review be completed before 30 June 2000 and that it cover the operation of managed discretionary accounts generally (including by ASX members). We understand that this review may need to take into account NDP services (if any) provided by these licensees. We will contact interested parties regarding the nature and timing of the intended policy review later this year.

## Managed discretionary accounts by ASX members

99 In our *Good Advice* report issued November 1995 we referred to our existing no action position regarding the operation of managed discretionary accounts by ASX members (see item 4.19 at pages 96 and 97).

100 We will continue this no action position until our intended review described in paragraph 96 and apply it in relation to the managed investment provisions. We provide this no action position because ASX members are subject to additional regulation as members of ASX.

101 We will continue our no action position as we are not aware of any significant reason why:

- (a) our no action position should be reassessed until our intended policy review takes place;
- (b) our intended policy review need to occur earlier as a matter of priority.

102 We note this subject in this policy proposal paper as we acknowledge there are some similar policy issues relevant to the operation of NDP services and managed discretionary accounts.

# Regulatory and financial impact

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1 We have considered the regulatory and financial impact of our policy proposals in this paper. In making this consideration we have sought to minimise the regulatory and financial impact and costs of operating a NDP service.

2 In general, we are of the view that the policy proposals in this paper have been preferred:

- (a) after consideration of any relevant options or issues discussed in the Explanation section of this paper;
- (b) after taking into account comments made by representatives of industry in:
  - (i) recent representative consultation conducted on our behalf by an independent research firm;
  - (ii) the draft report of the Investment & Financial Services Association Ltd on issues related to the regulation of master funds and wrap accounts issued in February 1999; and
- (c) in light of the information obtained in the general development of our policies to implement the *Managed Investments Act 1998* (ie: ASIC Policy Statements 130 to 136).

4 However, for the purposes of enabling us to assess more accurately the regulatory and financial impact of the policy proposals contained in this paper, we seek comments by affected persons on the following questions:

- (a) [RPG - Note to be completed]

# Development of policy proposal

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1 We have developed this policy proposal paper by considering:

- (a) the fundraising and managed investment provisions of the Law;
- (b) the intention of the legislation ...;
- (c) relevant comparisons ... such as PS 94;
- (d) relevant jurisdictional comparisons;
- (e) IFSA draft paper;
- (f) independent consultative research for ASIC;
- (g) issues raised in relevant novel applications for relief from the fundraising and managed investment provisions of the Law.

**[RPG - note to be described in more detail]**

# Key terms

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In this policy proposal:

“accessible securities” means those securities (including shares and interests in a managed investment scheme) that may be acquired by the custodian of the NDP service on direction from a client of the service;

“custodian” means the entity engaged by the operator to provide the back office systems and administrative support to undertake the master custody and client account reporting services which may form part of a particular NDP service. For example, this may be an unrelated entity engaged by the operator or a related entity of the same financial group established as a custodian;

“fundraising provisions” means those provisions in Divisions 2, 3, 3A and 6 Part 7.12 of the Law concerning prospectuses, secondary trading notices and securities hawking (for example: telephone selling);

“Law” means the Corporations Law;

“managed investment provisions” means those provisions in Chapter 5C of the Law on the:

- (a) requirements for registering a managed investment scheme. In general, a scheme must be registered if it has more than 20 members or has been promoted by a person who is the business of promoting schemes. The key exceptions are in s66(2) and include offerings of interests in a scheme for a minimum price of \$500,000; and
- (b) obligations when operating a registered scheme;

“NDP service” means a non-discretionary portfolio service that involves the acquisition or disposal of assets in which a client has an interest and providing consolidated reporting about the client’s interest in assets acquired through or held under the service. These services do not involve any discretion about acquisition or disposal of assets other than by the client. Typically, these services offer custody of some assets and pass on financial benefits such as cost reductions. For example, these services include most member discretionary master funds and wrap account services;

“operator” means the entity who offers participation in the NDP service. For example, this includes:

- (a) a financial planning firm which offers participation in the NDP service together with its investment advice service; and
  - (b) the custodian when the operator and custodian are one entity;
- “s601ED” (for example) is to a section of the Law.

# What will happen next?

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## Stage 1

[mid-May 1999]

ASIC policy proposal paper  
released

## Stage 2

25 June 1999

Comments due on the policy  
proposal

July-August 1999

Drafting of policy statement

## Stage 3

Early September 1999

Policy statement released

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**Your comments**

We invite your comments on the *proposals and issues for consideration* in this paper.

Comments are due by Friday 25 June 1999 and should be sent to:

Mark Adams  
Non-discretionary portfolio services policy review  
Regulatory Policy  
Australian Securities & Investments Commission  
GPO Box 4866  
Sydney NSW 1042  
Facsimile: (02) 9911 2622  
Email: mark.adams@asic.gov.au

You can also contact Mark Adams, Principal Lawyer, Regulatory Policy on (02) 9911 2622 for further information about this policy proposal.

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## **Annexure: Summary of disclosure requirements for a NDP service brochure**

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103 This annexure summarises what must you must include in a brochure about a NDP service (see proposal paragraphs 10 and 11).

104 A brochure must:

(a) describe the main features of the NDP service;

**[RPG - to be drafted similar in style to that for serviced strata schemes]**